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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No.

ARNOLD MARCUS, MARCUS DECORATING CO. INC., JERRY JEROME, JERED CONTRACTING CORP. and NATHAN WHEATMAN,

Petitioners,

v.

STATE OF NEW YORK.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, above-named, hereby petition for a writ of certiorari to review an order of the Court of Appeals entered on December 2, 1971, which became final on June 8, 1972 and which reversed an order of the Appellate Division, First Department which had invalidated certain search warrants on constitutional grounds.

OPINIONS BELOW

The opinion of New York Supreme Court Justice Fine denying the motions of all the petitioners with the exception of Wheatman, to suppress the search warrants is unreported, but is set out as Appendix A hereto.

The majority opinion of the Appellate Division, First Department reversing that decision and invalidating the warrants is reported sub nom. *People v. Wheatman*, 33 A.D. 2d 67, 304 N.Y.S.2d 904 and is Appendix B hereto. The dissent is similarly reported and is Appendix C. A further opinion of the Appellate Division on reargument as to Wheatman upholding the warrants as against Wheatman because of his alleged lack of standing is reported in 34 A.D.2d 3, 308 N.Y.S.2d 919 and is Appendix D hereto. The dissent is similarly reported and is Appendix E. The opinion of the Court of Appeals reversing and upholding the warrants is reported sub nom. *People v. Wheatman*, 29 N.Y.2d 337, 327 N.Y.S.2d 643 and is Appendix F hereto.

In its order of affirmance the Court of Appeals remanded the cause to the Appellate Division for consideration of other points which had been urged by the appellants. On remand the Appellate Division affirmed the convictions sub nom. *People v. Wheatman*, 38 A.D.2d 801, 328 N.Y.S.2d 1016 (Appendix G hereto). Thereafter the Court of Appeals affirmed on June 8, 1972 sub nom. *People v. Wheatman*, 31 N.Y.2d 12, – N.Y.S.2d – (Appendix H hereto).

Jurisdiction

The order sought to be reviewed was entered on December

2, 1971 (29 N.Y.2d 337) (Appendix I, hereto) and became final on June 8, 1972 (31 N.Y.2d 12) (Appendix J hereto). Jurisdiction is invoked pursuant to 28 U.S.C. section 1257(3).

Questions Presented

1. Does a prosecutor's affidavit for search warrants which sets forth his mere conclusions as to Grand Jury testimony and shows no basis for believing the documents sought would be in the places to be searched satisfy the requirements of the Fourth Amendment?

2. Did co-petitioner Wheatman, a co-defendant on trial, have standing to object to the reception in evidence against him of the prejudicial as to him, materials allegedly illegally seized from his co-defendants, co-petitioners here?

Constitutional Provision Involved

Amendment IV, United States Constitution:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statement of the Case

In the course of a Grand Jury investigation in 1965 into alleged bidrigging on public contracts, the Assistant District Attorney in charge of the case sought and obtained search warrants on the basis of an affidavit that raises the issue on this appeal and reads as follows:

"SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of
the application of Assistant District Attorney Joseph A. Phillips for a warrant authorizing the search of fourteen premises (listed below) for property utilized in the commission of a crime.

State of New York)
County of New York) ss.:

JOSEPH A. PHILLIPS, being duly sworn, deposes and says:

That I am the Assistant District Attorney in New York County charged with the responsibility of investigating to determine whether the crimes of bid rigging, bribery of public officers, bribery of labor representatives, extortion, assault, grand larceny and conspiracies to commit each of those crimes have been committed in relation to public contracts with the New York City Housing Authority; and as such I am familiar with the proceedings had heretofore in this investigation.

That this affidavit is made in support of this office's request for court orders authorizing the search of the offices fourteen separate painting contractors.

That the contractors and their addresses are as follows:

Jered Contracting Corp., 1 East 42nd Street, New York City

Benay Painting & Decorating Co., 157A Sherman Avenue, New York City,

Dunrite Painting Co., Inc., 1475-77 Seabury Place, Bronx, New York

Pelham Painting Co., Inc., 524 Southern Blvd., Bronx, New York

Marcus Decorating Co., Inc., 30 Church Street, New York City

Gerben Contracting Co., Inc., 20-31 129th Street, College Point, New York

Smith Decorating Co., Inc., 327 Canal Place, Bronx, New York

George Campbell Painting Corp., 40-11 149th Street, Flushing, New York

D.C. Decorating Corp., 215 East 149th Street, Bronx, New York

Hubbard Painting & Decorating Corp., 172 Neptune Avenue, Brooklyn, New York

Surf Painting Company, Incorporated, 38-38 Flatlands Avenue, Brooklyn, New York

Garfinkle Decorating Corp., 90-50 Parsons Blvd., Jamaica, New York

John Loconsolo & Co., Inc., 2660 Coney Island Avenue, Brooklyn, New York

Abraham Kaplan, 475 5th Avenue, New York City

That your deponent has examined the New York City Housing Authority's bid records for painting contracts and each of the above-named contractors or their predecessors has been doing business with the Authority for a period of years.

That the Authority's bid records also reflect the addresses of each of the itemized contractors.

That the Fourth April 1965 and the Third March 1965 Grand Juries have been hearing testimony in relation to the above-mentioned crimes since March of this year.

That officers or owners of each of the above-mentioned contracting firms have been called before the Grand Jury and requested to sign waivers of immunity pursuant to Section 103b of the General Municipal Law.

That with the exception of D.C. Decorating Corp. and Smith Decorating Corp. a principal of each of the contracting firms has refused to sign a waiver and each has had large painting contracts cancelled and has been disqualified from doing further business with the City.

That, in addition, Eli Smith the President of Smith Decorating Corp. has been indicted by the Grand Jury for his failure to continue testifying under his waiver of immunity.

That your deponent has been present at the proceedings of the Fourth April Grand Jury.

That your deponent has heard the sworn testimony of a number of witnesses before the Fourth April Grand Jury who have stated that they were parties to an agreement to rig bids at the City Housing Authority.

That the sworn testimony before that Jury further reveals that each of the above-named contracting firms has been identified as a party to the agreement to rig bids at the Housing Authority.

That the sworn testimony before the Grand Jury also reflects that the Housing Authority has two employees who prepare estimates of the man-days that it should take to paint certain portions of Housing Authority projects.

That the testimony further shows that the man-day estimates prepared are solely for the internal use of the Housing Authority in preparing its various financial statements and budgets.

That a sample of the Housing Authority man-day estimate is annexed hereto as an exhibit.

That the sworn testimony before the grand jury shows further that the parties to the bid rigging agreement were able to obtain the Housing Authority's estimate and that the parties utilized the information in the Housing Authority's estimate information to submit false bids to the Housing Authority.

That the sworn testimony of a number of witnesses stated that Jerry Jerome, who is a convicted felon and the President of Jered Contracting Corp., was the individual who obtained the Housing Authority estimate information and passed copies of that information on to the other parties to the agreement.

That based upon the foregoing reliable information and upon my personal knowledge there is probable cause to believe that the estimate information has been wrongfully obtained from the Housing Authority, that it has been utilized by the parties to the agreement to submit false bids to the Housing Authority and that copies of the estimate information may be found in the files of each of the parties to the corrupt agreement at the addresses set forth above.

WHEREFORE, I respectfully request that the court issue fourteen warrants and orders of seizure in the form annexed authorizing the search of each of the locations specified above and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court, together with such other and further relief that the court may deem proper.

No previous application in this matter has been made in this or any other court or to any other judge, justice or magistrate.

Joseph A. Phillips

(Sworn to June 15, 1965.)"

It is conceded that the Phillips affidavit was all that was presented to the magistrate. There was no examination by the magistrate of the Grand Jury minutes. This represents a unique situation as far as search warrants are concerned in that no other case to petitioners' knowledge, involves an affidavit for a search warrant by a prosecuting attorney which merely purports to summarize Grand Jury testimony.

When the fourteen warrants were executed, it was conceded below that incriminating documents were found at the offices of only five of the fourteen contractors involved. At the subsequent trial these documents were introduced against the petitioners and provided the corroboration that led to their convictions. The jury failed to agree on all the other contractors on trial; in their cases the searches pursuant to the warrants had been fruitless.

Petitioners moved promptly and unsuccessfully to invalidate the warrants on Fourth Amendment grounds (opinion of Fine, J., Appendix A).

On appeal to the Appellate Division, that court reversed, 3 to 2 (Appendices B and C).

On reargument, the Appellate Division upheld the warrants as to Wheatman (Appendices D and E).

On appeal to the Court of Appeals, that court unanimously reversed the Appellate Division and remanded the cause to the lower court to consider the other points which had been raised. (Appendices F and I).

On remand, the Appellate Division rejected the other grounds of appeal (Appendix G) and the Court of Appeals finally determined the matter by its affirmance on June 8, 1972 (Appendices H and J).

This petition follows.

POINT I

UPHOLDING THE UNIQUE AFFIDAVIT HERE INVOLVED WOULD HAVE THE IMPERMISSIBLE EFFECT, UNDER *COOLIDGE V. NEW HAMPSHIRE*, OF LETTING THE PROSECUTOR ISSUE HIS OWN WARRANT.

The Appellate Division majority (Appendix B) correctly evaluated the Phillips affidavit here involved when it held that:

> "Affiant's conclusion as to what witnesses said before the Grand Jury, without setting forth any of the testimony on which his conclusion rests, is not sufficient."

Just as this Court in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) invalidated the warrant issued by the Attorney General of New Hampshire on the ground that his action as a prosecutor by-passed the safeguard of a neutral and detached magistrate, the Phillips affidavit in suit should similarly be invalidated. The inability to check the basis for the prosecutor's conclusions makes a mockery of the role of the magistrate and in effect allows the prosecutor to issue his own warrant.

POINT II

THERE WAS NO SHOWING THAT THE MATERIALS SOUGHT WOULD BE IN THE PLACES TO BE SEARCHED.

In *Aguilar v. Texas*, 378 U.S. 108 (1964) this Court said that "*** the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed there were***."

The Phillips affidavit wholly failed to make any showing in this respect. While the affidavit claims that Jerome passed copies of the estimate information on to the other parties to the agreement, there is nothing to support any notion that the contraband would be kept in the files of the other parties. Indeed since the affidavit reflects that the contractors involved had been before the Grand Jury and therefore knew of the investigation, it would be most unlikely that incriminating papers would be retained. That this view has merit is shown by the fact that nothing incriminating was found in the files of nine of the fourteen contractors involved. Issuance of the warrants on that basis constituted a mere fishing expedition.

In short, the order below ignored the rule of *Aguilar, supra.*

POINT III

SINCE WHEATMAN WAS A CO-DEFENDANT ON TRIAL AND WAS MATERIALLY ADVERSELY AFFECTED BY THE MATERIALS ALLEGEDLY ILLEGALLY SEIZED FROM HIS CO-DEFENDANTS, HE HAD STANDING TO OBJECT TO THE RECEPTION IN EVIDENCE OF THOSE MATERIALS.

Conclusion

This Court should grant certiorari and the order below should be reversed.

August, 1972

FREDERICK H. BLOCK &
IRVING ANOLIK
Attorneys for Petitioners

Appendix A – Opinion below at Special Term New York County (Fine, J.)

SUPREME COURT – NEW YORK COUNTY
TRIAL TERM – PART XXX

Ind. No. 2886/65–Ind. No. 3954/66
The People of the State of New York

against

Arnold Marcus and Marcus Decorating Co., Inc.,
Defendants.

Ind. No. 2439/65–Ind. No. 3954/66
The People of the State of New York

against

Sam Spector and Dunrite Painting Co., Inc.,
Defendants.

FINE, J.:

Defendants, individually and corporately in each proceeding, move for an order vacating the search warrants herein and for the return of the property seized in execution thereof, and for its suppression from use as evidence against them. It is urged that the search warrants were issued without a showing of sufficient probable cause and, moreover that personal papers of defendants, not related to the charge against them, were seized

by the police under the authority of said warrants.

The defendants Arnold Marcus and Marcus Decorating Co., Inc., as were the defendants Sam Spector and Dunrite Painting Co., Inc., were charged in separate indictments with conspiracy and bribery, as well as perjury, first degree. The perjury counts dealt with the affirmation of defendants that their respective bids to the New York City Housing Authority for the purpose of securing a contract to furnish said Authority with material and services, were genuine and not collusive or sham.

The search warrants in question were issued by this court on June 15, 1965 on the supporting affidavit of Assistant District Attorney Joseph A. Phillips of New York County. In his deposition he alleged that he had examined the New York City Housing Authority's bid record of fourteen named painting and decorating contractors. That with the exception of two of these contractors, all had refused to testify before the grand jury under waiver of immunity. That he had heard the testimony of a number of witnesses who testified before the grand jury, who were parties to an agreement to rig bids to the New York City Housing Authority, and that each of the contractors named in the deposition had been identified as a party to the agreement to rig bids. That these contractors had been able to obtain the Housing Authority's estimates and that the parties utilized the information to submit false bids to the authority; whereupon deponent requested the issuance of fourteen search warrants authorizing the search of each of the specified locations and directing that any property or evidence seized thereunder be brought before the court.

The court is satisfied, on the basis of the foregoing, that the warrants herein were issued upon a showing of sufficient

probable cause. The affidavit of Assistant District Attorney Phillips spelled out in detail the circumstances from which a "neutral and detached magistrate could independently determine that probable cause existed for the warrant to issue" (Aguilar v. Texas, 378 U.S. 108, 114-115, cited in People v. Montague, 19 N.Y.2d 121).

The motion to controvert the search warrant and for the suppression of evidence is accordingly denied. A hearing, however, is directed to be held before this court on June 12, 1967 at 10:00 A.M. in Part 40, Supreme Court, New York County to determine other related issues raised by defendants with respect to the suppression of certain seized documents as evidence against them.

Dated: May 31st, 1967.

S.A.F.
J.S.C.

Appendix B – Majority Opinion of Appellate Division Reversing Fine, J.

SUPREME COURT
APPELLATE DIVISION–FIRST DEPARTMENT

September 1969

Samuel W. Eager, J.P.,
Louis J. Capozzoli,
George Tilzer,
Emilio Nunez,
James B. M. McNally, JJ.

1001-05

The People of the State of New York,
Respondent,

vs.

Nathan Wheatman, Jerry Jerome, Samuel Spector, Jered Contracting Co., Inc., Dunrite Painting Co., Inc.,
Defendants-Appellants.

1006-07

The People of the State of New York,
Respondent,

vs.

Arnold Marcus & Marcus Decorating Co. Inc.,
Defendants-Appellants.

Appeals from judgments of the Supreme Court of the State of New York, County of New York, rendered May 24, 1968 and June 20, 1968, convicting the appellants, after a joint trial (Davidson, J. and a jury) of one count of Conspiracy, six counts of Conspiracy to Prevent Competitive Bidding on Public Contracts and Bribery.

Irving Anolik for appellant Nathan Wheatman

Irving Anolik and Rudolph Ebenfeld of counsel for appellants Jerry Jerome and Jered Contracting Corp.

Benjamin Shedler of counsel (Allen H. Weiss with him on the brief; Shedler & Weiss, attorneys) for appellants Samuel Spector and Dunrite Painting Co. Inc.

Frederick H. Block for defendants-appellants Arnold Marcus and Marcus Decorating Co. Inc.

Joseph A. Phillips of counsel (Michael R. Juviler and Alan Scribner with him on the brief; Frank S. Hogan, District Attorney) for respondent.

PER CURIAM:

Judgments entered May 24, 1969 and June 20, 1968 convicting defendants-appellants of conspiracy and bribery reversed on the law, and a new trial ordered. The search warrant issued June 15, 1965 is vacated and the evidence seized upon its execution is suppressed.

Defendants' motion to vacate the search warrant and to suppress the records seized in the execution thereof predicated upon the insufficiency of the affidavit of Assistant District Attorney Joseph A. Phillips should have been granted. The documents seized and introduced at the trial were vital to the People's case for, except as to defendant Wheatman, they

provided the necessary corroboration of the incriminating testimony given by co-conspirators which, standing alone, would be insufficient to convict.

The Phillips' affidavit recites that there was a bid-rigging arrangement on work for the New York City Housing Authority among a number of painting contractors, that in connection therewith the contractors obtained estimates of the man days that it should take to paint certain portions of Authority projects; that these estimates were solely for the internal use of the Authority and that parties to the bid-rigging agreement obtained copies thereof and utilized them to submit false bids to the Authority. All of the foregoing is said to have been testified to by a number of witnesses before the grand jury, but the affidavit is barren of any identification of the alleged witnesses, of the substance of the testimony claimed as support for affiant's conclusion and of anything to indicate the basis of the witnesses' testimony or to demonstrate the reliability of such testimony. The affidavit concludes:

> "That based upon the foregoing reliable information and upon my personal knowledge there is probable cause to believe that the estimate information has been wrongfully obtained from the Housing Authority, that it has been utilized by the parties to the agreement to submit false bids to the Housing Authority and that copies of the estimate information may be found in the files of each of the parties to the corrupt agreement at the addresses set forth above."

Affiant's conclusion as to what witnesses said before the grand jury, without setting forth any of the testimony on which his conclusion rests, is not sufficient. Where hearsay is relied on, it must be shown to come from a reliable source and must in and of itself be able to justify a finding of probable cause. *People v.*

Hendricks, 25 N.Y.2d 129; *People v. Malinsky*, 15 N.Y.2d 86, 93, 94; *People v. McCall*, 17 N.Y.2d 152. He completely fails to state the basis, nature or content of his claimed "personal knowledge".

The affidavit at bar fails to meet the two pronged test laid down in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 and more recently reaffirmed in *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 and most recently reaffirmed by the Court of Appeals in *People v. Hendricks, supra.* In short that test requires that the affidavit show (1) whether the informant is in fact reliable, and (2) whether the underlying circumstances as to how the informant came by his information demonstrates sufficient probability of credibility to allow the search of the premises or person in question.

While we should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a common sense manner (*United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684), the law is clear that the Magistrate must be informed of the underlying circumstances which support the conclusion and belief of the affiant that his informant was credible and his information reliable (*People v. Hendricks, supra*, at p. 39).

In view of our ruling on the invalidity of the search warrant, we did not reach and, therefore, did not consider the other points raised by appellants. For the foregoing reasons, the judgments of conviction are reversed, on the law, and a new trial ordered as to each appellant.

All concur except Tilzer and McNally, JJ., who dissent in an opinion by McNally, J.

Appendix G – Dissenting Opinion in Appellate Division

McNally, J. (dissenting):

I dissent and vote to affirm.

The motion to vacate the search warrant is grounded solely on lack of probable cause. No issue of fact is involved. Hence, no hearing was necessary. See sec. 813-c, Code of Crim. Proc.

The affidavit in support of the warrant which has been declared invalid is as follows:

"Joseph A. Phillips, being duly sworn, deposes and says:

That I am the Assistant District Attorney in New York County charged with the responsibility of investigating to determine whether the crimes of bid rigging, bribery of public officers, bribery of labor representatives, extortion, assault, grand larceny and conspiracies to commit each of these crimes have been committed in relation to public contracts with the New York City Housing Authority; and as such I am familiar with the proceedings had heretofore in this investigation.

That this affidavit is made in support of this office's request for court orders authorizing the search of the offices [of] fourteen separate painting contractors.

That the contractors and their addresses are as follows:

* * *

That your deponent has examined the New York City Housing Authority's bid records for painting contracts and

each of the above-named contractors or their predecessors has been doing business with the Authority for a period of years.

That the Authority's bid records also reflect the addresses of each of the itemized contractors.

That the Fourth April 1965 and the Third March 1965 Grand Juries have been hearing testimony in relation to the above-mentioned crime since March of this year.

That officers or owners of each of the above-mentioned contracting firms have been called before the Grand Jury and requested to sign waivers of immunity pursuant to Section 103b of the General Municipal Law.

That with the exception of D.C. Decorating Corp. and Smith Decorating Corp. a principal of each of the contracting firms has refused to sign a waiver and each has had large painting contracts cancelled and has been disqualified from doing further business with the City.

That, in addition, Eli Smith the President of Smith Decorating Corp. has been indicted by the Grand Jury for his failure to continue testifying under his waiver of immunity.

That your deponent has been present at the proceedings of the Fourth April Grand Jury.

That your deponent has heard the sworn testimony of a number of witnesses before the Fourth April Grand Jury who have stated that they were parties to an agreement to rig bids at the City Housing Authority.

That the sworn testimony before that Jury further reveals that each of the above-named contracting firms has been identified as a party to the agreement to rig bids at the Housing Authority.

That the sworn testimony before the Grand Jury also

reflects that the Housing Authority has two employees who prepare estimates of the man-days that it should take to paint certain portions of Housing Authority projects.

That the testimony further shows that the man-day estimates prepared are solely for the internal use of the Housing Authority in preparing its various financial statements and budgets.

That a sample of the Housing Authority man-day estimate is annexed hereto as an exhibit.

That the sworn testimony before the grand jury shows further that the parties to the bid rigging agreement were able to obtain the Housing Authority's estimate and that the parties utilized the information in the Housing Authority's estimate information to submit false bids to the Housing Authority.

That the sworn testimony of a number of witnesses stated that Jerry Jerome, who is a convicted felon and the President of Jered Contracting Corp., was the individual who obtained the Housing Authority estimate information and passed copies of that information on to the other parties to the agreement.

That based upon the foregoing reliable information and upon my personal knowledge there is probable cause to believe that the estimate information has been wrongfully obtained from the Housing Authority, that it has been utilized by the parties to the agreement to submit false bids to the Housing Authority and that copies of the estimate information may be found in the files of each of the parties to the corrupt agreement at the addresses set forth above.

WHEREFORE, I respectfully request that the court issue fourteen warrants and orders of seizure in the form annexed authorizing the search of each of the locations specified above and directing that if such property or evidence or any part thereof be found that it be seized and

brought before the court, together with such other and further relief that the court may deem proper.

No previous application in this matter has been made in this or any other court or to any other judge, justice or magistrate."

The basic principles applicable to search warrants are: (1) "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall". *United States v. Ventresca*, 380 U.S. 102, 106; *People v. Schnitzler*, 18 NY 2d 457); (2) probable cause requires less evidence than proof of guilt *(Ventresca, supra*, at 107); (3) probable cause may be based on evidence incompetent in a criminal trial *((id.* at 107); *People v. Rogers*, 15 NY 2d 422); and (4) the facts and circumstances need only satisfy one of reasonable caution that the offense has been or will be committed *(Carroll v. United States*, 267 U.S. 132, 162; *Brinegar v. United States*, 338 U.S. 160, 176).

"[T]he courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." (*Ventresca, supra*, at 109.)

The affidavit in support of the search warrant derives from sworn testimony before the Grand Jury and records of the New York City Housing Authority.

That appellants have been doing business with the Authority for a period of years as alleged in the supporting affidavit is not denied. Characterized as conclusory are the allegations therein that sworn testimony before the Grand Jury is that appellants "were parties to an agreement to rig bids at the City Housing Authority", that each appellant "has been

identified as a party to the agreement to rig bids at the Housing Authority"; that "parties to the bid rigging agreement were able to obtain the Housing Authority's estimate and that the parties utilized the information in the Housing Authority's estimate information to submit false bids to the Housind Authority"; and that "witnesses stated that Jerry Jerome, who is a convicted felon and the President of Jered Constracting Corp. was the individual who obtained the Housing Authority estimate information and passed copies of that information on to the other parties to the agreement."

People v. Hendricks, 25 NY 2d 129, was an informer case. (See also *Aguilar v. Texas*, 378 U.S. 108, and *Spinelli v. United States*, 393 U.S. 410.) The courts have treated informer cases in substantially the same manner. (*Draper v. United States*, 358 U.S. 307; *Jones v. United States,s*, 362 U.S. 257; *People v. Munger*, 24 NY 2d 445; *People v. Cerrato*, 24 NY 2d 1; *People v. Montague*, 19 NY 2d 121; *People v. Schnitzler, supra*; *People v. Malinsky*, 15 NY 2d 86; *People v. Coffey*, 12 NY 2d 443.) The informer gives oral information to a law enforcement officer. The informer is not required to take an oath. The details of his information are not recorded. His identity may not be disclosed. He does not appear as a witness.

The identities of the witnesses and their testimony were disclosed on the trial of this case. In deciding *Hendricks, supra*, the Court of Appeals held:

> "In short, that test required that the affidavit show (1) whether the informant is in fact reliable, and (2) whether the underlying circumstances as to how the informant came by his information demonstrates sufficient probability of credibility to allow the search of the premises or person in question."

A reading of the affidavit demonstrates that it meets the strictest of tests, even if it be assumed that the test in the instant case is that applied to an informer case.

Grand Jury testimony is not analogous to the unsworn statements of informers. Testimony under oath is *prima facie* credible. Hence, there need be no independent evidence of reliability in respect of testimony before a Grand Jury. The informer cases are inapplicable.

In the instant case, the search warrant issued on probable cause. The Assistant District Attorney in New York County charged with investigating to determine whether the crimes of bid rigging and related crimes were committed in relation to public contracts with the New York City Housing Authority submitted his affidavit based on sworn testimony in his presence before the Grand Jury. "The Grand Jury can receive none but legal evidence." (Sec. 249, Code of Crim. Proc.) The evidence before the Grand Jury, therefore, was not hearsay. The Assistant District Attorney stated under oath that the testimony was to the effect that Jerry Jerome obtained Housing Authority estimate information and passed copies on to the parties to the agreement. In addition, his affidavit stated the appellants were identified as parties to the agreement.

Probable cause is not circumscribed by the rules of evidence applicable to a criminal trial. Rigid adherence to the technical rules of evidence has no place in the area of search and seizure where a commonsense and realistic appraisal supports the issuance of the warrant. (*Ventresca, supra,* at 108.) The issuing Justice, in the light of the "underlying circumstances" (*Aguilar v. Texas, supra,* at 114), properly decided there was probable cause for the warrant. If this is a doubtful case, which

it is not, we should sustain the warrant. (*Id.*, at 106.)

Appellants' contention that the affidavit in support of the warrant is silent on the likelihood of the records to be searched for will be at the offices of appellants is without substance. There was substantial basis that the records sought probably would be at the offices of the corporations named. (*People v. Montague, supra*, at 125.) The affidavit is detailed and precise and has no element of rumor connected with it. It describes in detail the number of conspirators, their method of operation, names the ringleader, traces the source of the Housing Authority estimate to the ringleader, and his distribution of the estimate to the other conspirators.

From the foregoing, I conclude that the search warrant in this case conforms not only to the general principles applicable to all search warrants but more particularly to the test set forth in *Hendricks, supra.*

Tilzer, J. concurs

Appendix D – Majority Opinion of Appellate Division on reargument as to co-petitioner Wheatman

SUPREME COURT, APPELLATE DIVISION
First Department, February 1970

Samuel W. Eager, J.P.,
Louis J. Capozzoli,
George Tilzer,
Emilio Nunez,
James B.M. McNally, JJ.

The People of the State of New York,
Respondent,

against

Nathan Wheatman,
Defendant-Appellant.

Motion for reargument as to the defendant Wheatman so as to modify the order of November 6, 1969, and affirm the judgment of conviction as to him.

Irving Anolik, attorney for defendant-appellant.

Lewis R. Friedman of counsel (Michael R. Juviler with him on the brief; Frank S. Hogan, District Attorney) for respondent.

Motion No. 2059-November 28, 1969

Appeal 1001 – People v. Nathan Wheatman and others

McNALLY, J.

On the application of the District Attorney during the February 1970 term, we granted reargument of the appeal with reference to defendant Wheatman, 33 AD 2d ——. The judgments of conviction herein were previously reversed on the law, and a new trial directed, Justices McNally and Tilzer dissenting. (33 AD 2d 67) and voting to affirm. The reversal was grounded on the validity of the search warrant and the suppression of the evidence discovered.

In support of reargument with reference to Wheatman, the District Attorney argues that the search warrant was not directed against Wheatman and that his property was not seized and he, therefore, was neither the victim nor the person against whom the search was directed. It is argued Wheatman has no standing since his constitutional rights were not infringed, and he cannot be heard to complain of the violation of the constitutional rights of another. Whether the person claiming standing has been a victim of constitutional infringement depends on the facts in each case and the person's relation to the objects seized or premises searched. *People v. Estrada*, 28 AD 2d 681, *aff'd*, 23 NY 2d 719; *People v. Morbouse*, 21 NY 2d 66, 76 "[O]nly a person claiming to be aggrieved by an unlawful search and seizure" has standing to move to suppress. (Section 813-c, Code of Criminal Procedure) See also *Jones v. United States*, 362 U.S. 257, 261.

Defendant Wheatman fails to establish he was the victim or the person against whom the search was directed. His claim that the seized evidence was used against him without a showing that

it is the product of an illegal search of his person or his premises does not establish the violation of a protected constitutional right. *Alderman v. United States*, 394 U.S. 165; *People v. Cefaro*, 21 NY 2d 252, 257, reversed on reargument on other grounds, 23 NY 2d 283.

Accordingly, on reargument the order of November 6, 1969 is modified to affirm the conviction of appellant Wheatman.

All concur except Nunez and Eager, JJ., who dissent in a dissenting opinion by Nunez, J.

1001

NUNEZ, J. (dissenting)

The District Attorney's motion to modify the order of reversal as to Wheatman should be denied.

We reversed the conviction of each appellant and directed a new trial upon the ground that the search warrant issued June 15, 1965 was invalid and that the evidence seized thereunder should have been suppressed.

The District Attorney belatedly makes the point that the warrant was not directed against defendant Wheatman; that none of his property was seized and that, therefore, he cannot be heard to complain that a violation of the co-defendants' constitutional protection has prejudiced him; he contends that because Wheatman was neither the victim nor the person against whom the search was directed he lacked standing to challenge the validity of the search warrant.

The question of Wheatman's standing is raised on this reargument motion for the first time. It was not raised at Trial Term or on the appeal in chief. Absent special circumstances, here non-existent, the question cannot be raised now. See *People v. Fino*, 24 N.Y. 2d 1020 (1969).

The trial court erroneously ruled that the unlawfully seized evidence was admissible against all the defendants. No limiting instructions were given. Twenty-five counts were submitted to the jury against thirteen defendants. The jury

convicted only Wheatman and six others of several conspiracy counts and bribery; it disagreed as to the remaining six defendants on all counts.

The People are requesting that we treat Wheatman the same as if his application for a severance had been granted, whereas it was opposed by the People and denied. We cannot say that the jury would have convicted Wheatman had the trial court properly excluded the seized evidence against all the remaining defendants.

I feel that the error in illegally admitting the evidence against all the defendants has so permeated the record as to deny Wheatman a fair trial of this multiple count indictment and highly complex joint trial.

The illegally seized evidence should have been excluded as prejudicial to all defendants, whether with or without standing to object to its admission. Although Wheatman was without standing, as a co-defendant, he had "the right not to be convicted upon the basis of such evidence" (*Rosencranz v. United States*, 334 F.2d 738, 741). He is entitled as a matter of law to reversal of the conviction and a new trial. (See *Rosencranz v. United States, supra; McDonald v. United States*, 335 U.S. 451; *Barnett v. United States*, 384 F.2d 848; *Fourth Amendment Principles of Supreme Court Practice*, 25 Ohio St. L.J. 538, 570.)

Furthermore, since the convictions of the others have been reversed and a new trial has been ordered the interests of justice and fairness command the reversal of Wheatman's conviction and the granting of a new trial as to him also. See *People v. Rudish*, 294 N.Y. 500; *People v. Stringfellow*, 26 A.D.2d 771; *People v. Weiss*, 290 N.Y. 160, 174.

Eager, J.P. concurs.

Appendix F – Opinion of N.Y. Court of Appeals reversing Appellate Division (on search and seizure point)

STATE OF NEW YORK
COURT OF APPEALS

The People &c.,

Appellant,

vs.

Nathan Wheatman,

Defendant,

and

Jerry Jerome and Jered Contracting Corp., & ors.,

Respondents.

The People &c.,

Respondent,

vs.

Nathan Wheatman,

Appellant.

FULD, CH.J.:

Seven defendants were adjudged guilty of crimes of conspiracy and bribery following a jury trial and, on appeal, the Appellate Division reversed and ordered a new trial, holding

that the affidavit, relied on by the District Attorney to procure search warrants, was insufficient. The People took an appeal to our court, following a grant of leave but, before that appeal was perfected, the Appellate Division, upon the District Attorney's application, granted a reargument with respect to the defendant Wheatman (33 AD 2d 1107). Upon the reargument, the court reversed itself and affirmed that defendant's conviction on the ground that he lacked standing to challenge the validity of the warrants or the lawfulness of the subsequent search and seizure (34 AD 2d 3). Thus, we have before us an appeal by the People as to six of the defendants and an appeal by the seventh defendant, Wheatman. Since the People's appeal poses the central issue to be decided – namely, the sufficiency of the District Attorney's affidavit and the admissibility of documents introduced into evidence – we consider that appeal first.[1]

The People's Appeal

In 1965, the District Attorney of New York County undertook an investigation of an alleged bid-rigging conspiracy to prevent competitive bidding on publicly advertised contracts for painting at city housing projects. Involved, among others, were three painting contractor firms, an individual representative from each of them and Wheatman, who was an official of the New York City Housing Authority. In brief, the People claim that the painting contractors, acting together and in concert, reached a decision in each instance as to who would win the various advertised contracts as well as the prices to be bid. To succeed in their scheme, they required inside information concerning Housing Authority estimates for bidding,

1. In deciding the case as it did in favor of the six defendants, the Appellate Division expressly noted that it did not consider the question of the defendants' guilt or the other points advanced by them (33 A D 2d, at p. 69).

and this, it was asserted, they obtained, for a price, from Wheatman and other officials who headed the Authority's paint sections.

During the course of the ensuing grand jury investigation, the Assistant District Attorney who was in charge of the inquiry, Mr. Joseph A. Phillips, applied to Supreme Court Justice Fine for the issuance of warrants to search the offices of the three corporate defendants and eleven other contracting companies. He submitted in support of his application only his own affidavit, based in all important respects, according to him, upon testimony given before the grand jury. As indicated, it is the adequacy of this affidavit which is here in issue.

Mr. Phillips first stated what he personally knew about the contractors – that is, that they had been doing business with the Housing Authority for a period of years and that the Authority had their addresses on file. He then went on to aver that he "has heard the sworn testimony of a number of witnesses before the *** grand jury who have stated that they were parties to an agreement to rig bids at the Housing Authority" and that such sworn testimony "further reveals that each of the *** contracting firms [listed in the affidavit] has been identified as a party to the agreement to rig bids."

Phillips followed this with a summary of the testimony given by the witnesses which described the operation of the conspiracy: that Housing Authority employees prepared "estimates of the man-days" required on certain projects; that such estimates were solely for the internal use of the Authority; that the parties to the bid-rigging agreement obtained those estimates and "utilized the information" contained in them "to submit false bids"; that Jerry Jerome, president of Jered

Contracting Corp., was the person who obtained the estimate information and then passed copies of it on to the other parties to the agreement. Mr. Phillips concluded with the statement that, "based upon the foregoing information and upon my personal knowledge there is probable cause to believe that the estimate information has been wrongfully obtained from the Housing Authority, that it has been utilized by the parties to the agreement to submit false bids to the Housing Authority and that copies of the estimate information may be found in the files of each of the parties to the corrupt agreement at the addresses set forth [in the affidavit]."

On the strength of this affidavit, Judge Fine issued the warrants in question. They authorized the police to search the offices of the companies listed and to seize certain "hand-written and typewritten copies of the New York City Housing Authority painting estimate forms." The search which followed turned up a number of forms, and the defendants, prior to trial, moved to suppress this evidence; the motion was denied on the ground that the affidavit "spelled out in detail the circumstances from which a 'neutral and detached magistrate could independently determine that probable cause existed for the warrant to issue." Upon the trial, those forms were offered and received in evidence on the People's case to corroborate the testimony given by the witnesses who acknowledged being parties to the bid-rigging agreement. Although the jury found the defendants guilty, a sharply divided Appellate Division, as noted above, reversed the judgments of conviction and ordered a new trial (33 AD 2d 67). It was the view of the majority that Phillips' affidavit failed to inform the judge who issued the warrant "of the underlying circumstances which support the conclusion and belief of the affiant that his informant was credible and his information reliable (*People v. Hendricks* [25

NY 2d 129])" (33 AD 2d, at p. 69). It was the view of the two dissenting justices that "the search warrant in this case conforms not only to the general principles applicable to all search warrants but more particularly to the test set forth in *Hendricks*" (33 AD 2d, at p. 73).

We agree with the conclusion reached by the Appellate Division dissenters that Phillips' affidavit was sufficient to establish probable cause and that, consequently, the warrants were valid, the search lawful and the evidence seized admissible. More specifically, the affidavit satisfied the test formulated by the Supreme Court (see *United States v. Harris*, 403 U.S. 573; *Whiteley v. Warden*, 401 U.S. 560; *Spinelli v. United States*, 393 U.S. 410; *Aguilar v. Texas*, 378 U.S. 108) and, of course, by our court. (See *People v. Dumper*, 28 NY 2d 296; *People v. Hendricks*, 25 NY 2d 129.) It is settled, as those cases indicate, that, where the affidavit is based upon hearsay and not solely on the personal knowledge of the affiant, it must, in order to satisfy the law's requirements, set forth facts which will enable a magistrate to judge for himself (1) the reliability (or credibility) of the informant and (2) the reliability of his information. Only then can a reviewing court be satisfied that the magistrate has discharged his "constitutional duty" of reaching a neutral and independent determination that probable cause exists (*Spinelli v. United States*, 393 U.S. 410, 415, *supra*), instead of serving merely as "a rubber stamp for police or prosecution". (*Aguilar v. Texas*, 378 U.S. 108, 111, *supra*.)

Since the Appellate Division declared that the affidavit submitted by the District Attorney "fails to meet the two-pronged test" (33 AD 2d, at p. 69), laid down in the decisions referred to, we treat, first, the question of the reliability of the so-called informants – the witnesses before the grand jury –

whose "information" – testimony in this case – Mr. Phillips relied upon and, second, the question whether "the informant[s] had gained [their] information in a reliable way." (*Spinelli v. United States*, 393 U.S., at p. 417.)

Although the informant's reliability is frequently established by a statement from the affiant that the informant is known to him and has in the past furnished information leading to the arrest and conviction of others or by a separate objective checking of the informant's story (see *People v. Hendricks*, 25 NY 2d 129, 133-134, *supra*), there are, of course, other circumstances demonstrating his probable reliability. Thus, our court, as well as others, have noted that a magistrate may rely, for instance, upon the fact that the information was given under oath, that the statements were against the informer's penal interest and that two or more informers tended to confirm the information which each gave. (See *People v. Montague*, 19 NY 2d 121, 125; *United States v. Harris*, 403 U.S. 573, 583-584, *supra*; *Spinelli v. United States*, 393 U.S. 410, 423, *supra* [per White J., concurring]; *People v. Fein*, 4 Cal 3d 747, 753; *Skelton v. Superior Court*, 1 Cal 3d 144, 151, 153; *People v. Sheridan*, 2 Cal App 3d 483, 488; *People v. Clark*, —— Colo. ——, 488 P 2d 565.)

In the present case, not only did the informants furnish their information under oath before a grand jury but each testified against his penal interest as well – that is, each admitted that he was a party to a bid-rigging agreement (see, e.g., *United States v. Harris*, 403 U.S. 573, 583-584, supra) – and at least two informants substantiated each other's testimony. (See, e.g., *People v. Fein*, 4 Cal 3d 747, 753, *supra*; *People v. Clark*, —— Colo. ——, 488 P 2d 565, *supra*.)

This brings us to a discussion of the reliability of the information – the second "prong" of the test – and actually the crux of the controversy in the case before us. To satisfy this requirement, there must be sufficient information before the magistrate to enable him to deduce that the informant gained his information in a reliable manner, that is, that his conclusion that a crime has been committed rests on "something more substantial than a casual rumor circulating in the underworld *** [or] *** an offhand remark heard at a neighborhood bar." *(Spinelli v. United States,* 393 U.S. 410, 417, *supra.)* Here, the magistrate's finding of reliability depended not upon rumor but upon information, in the form of grand jury testimony, from witnesses who had firsthand knowledge of the matters involved – a circumstance regarded as significant. (See, e.g., *People v. Hendricks,* 25 NY 2d 129, 134, *supra; Spinelli v. United States,* 393 U.S. 410, 416, *supra; People v. Munger,* 24 NY 2d 445, 451; *People v. Montague,* 19 NY 2d 121, 125, *supra.)*

The firsthand character of the informers' information evident from the recital in the affidavit that a number of grand jury witnesses testified that "*they* were parties to an agreement to rig bids"; that the companies named in the affidavit – including the corporate defendants were also "part[ies] to the agreement"; and that one of the defendants, Jerry Jerome, was the conspirator who obtained from the Housing Authority the bid estimate information necessary in the preparation of the rigged bids and that it was he who passed it on to the other parties to the conspiracy. (See *People v. Munger,* 24 NY 2d 445, 451, *supra; People v. Montague,* 19 NY 2d 121, 125, *supra;* see, also, *Spinelli v. United States,* 393 U.S., at p. 425 [*per* White, J., concurring].)

The defendants contend, however, that the affidavit is

defective in that it fails to furnish the requisite "substantial basis" – demanded by the cases (see *Jones v. United States*, 362 U.S. 257, 271; see, also, *Aguilar v. Texas*, 378 U.S. 108, 114, *supra*) – for concluding that the material sought, i.e., the bid estimate forms, would "probably" be found in the offices of the contractor firms named in the affidavit. The argument is without merit. Since the bid estimate information was essential to the preparation of the false bids and the carrying on of the conspiracy, it was entirely reasonable to conclude that the forms would be in the offices of the conspirators.

We would but add that, since the informants upon whom the District Attorney relied were witnesses before the grand jury, the defendants were not entitled to their names. When the search warrant was sought, the investigation was in its early stages and no indictment had as yet been returned. It was particularly important, therefore – as this court had occasion to point out in a somewhat different context (see *People v. DiNapoli*, 27 NY 2d 229, 235) – that the identity of the witnesses be not revealed in order (1) to protect them "from interference from those under investigation," (2) to prevent "subornation of perjury and tampering with prospective [trial] witnesses" and (3) to assure "prospective witnesses [before the grand jury] that their testimony will be kept secret" to induce them to testify freely. (See, also, *People v. Doe*, 47 Misc. 2d 975, 977-979, affd. 24 AD 2d 843; *People v. Banks*, 27 Misc. 2d 557; 8 Wigmore, Evidence [McNaughton Rev., 1961] § § 2360-2362.)

In short, then, the affidavit in support of the application for the search warrants was sufficient to establish probable cause. Accordingly, the order appealed from by the People should be reversed and the case remitted to the Appellate

Division so that it may pass upon the facts and the contentions advanced by the defendants for reversal. (Code Crim. Pro., § 543-b [now CPL 470.40, subd. 2(c)]; see *People v. Phinney*, 22 NY 2d 288, 291.)

Defendant Wheatman's Appeal

There remains for disposition the appeal taken by the defendant Wheatman. The Appellate Division, deciding on reargument that he had no standing to challenge the validity of the warrants or the lawfulness of the search and seizure, affirmed his conviction. Concluding, as we have, that the prosecutor's affidavit is sufficient and the warrants valid, it becomes unnecessary to consider Wheatman's standing. However, since only that question was orally argued in our court, he should, before we finally decide his appeal, be afforded an opportunity to present an oral argument on the other points contained in his brief. The determination of the appeal taken by Wheatman should, therefore, be withheld and the case set down for oral argument or submission in this court during its February 1972 session.

* * * * * * *

Upon the appeal by the People:

Order reversed and the case remitted to the Appellate Division for further proceedings in accordance with the opinion herein. Upon the appeal by defendant Wheatman:

Determination of the appeal withheld and the case set down for oral argument or submission on additional points during the February 1972 session of this Court. Opinion by Fuld, Ch. J. All concur.

Appendix G – Opinion of Appellate Division on Remand

Eager, J.P., Capozzoli, Tilzer, Nunez, McNally, JJ.

1002-7

The People of the State of New York,
Respondent, L.R. Friedman

-against-

Nathan Wheatman, Jerry Jerome, Samuel Spector, Jered Contracting Co., Inc., Dunrite Painting Co., Inc.,
Defendants-Appellants. I. Anolik
Shedler & Weiss

The People of the State of New York,

Respondents, L. R. Friedman

-against-

Arnold Marcus & Marcus Decorating Co., Inc.,

Defendants-Appellants. F.H. Block

On remand from the Court of Appeals, –NY 2d–, we have considered the points raised by the defendants, other than Wheatman, and find them without merit, and accordingly we unanimously affirm the judgments of the Supreme Court, New York County, rendered May 24, 1968, as to defendants Jerome, Spector, Jered and Dunrite, and the judgments of said Court rendered June 20, 1968, as to defendants Marcus and Marcus

Decorating. See *People v. Wheatman*, 33 A.D.2d 67; *People v. Wheatman*, 34 A.D.2d 3. Defendant's reliance on *People v. Wyler and Hayes*, 37 A.D.2d 375, is misplaced. On the undisputed facts in the cited case, the witness was an accomplice as a matter of law. In the instant case there was a substantial factual issue relative to Feldman being an accomplice. The jury under the charge was enabled to find on the facts that Feldman was an accomplice or a subordinate employee acting under the direction of his employers.

All concur, with Nunez, J. concurring in the following memorandum:

The Trial Court should have instructed the jury that Sidney Feldman was an accomplice as a matter of law. Feldman admitted that on two separate occasions he gave money to Nolan, an employee of the New York City Housing Authority. He further admitted that he knew he was bribing Nolan. His proffered excuse, that he was following his employer's instructions is of no avail. However, while the court erred in failing to charge that Feldman was an accomplice (see *People v. Wyler, et al.*, 37 A.D. 2d 375 (1st Dept. 1971), I concur in affirmance only because were his testimony deleted from the record, there would remain an over-abundance of evidence establishing the defendants' guilt beyond a reasonable doubt. See *People v. Pelow*, 24 N.Y.2d 161, 1967. The error committed must, therefore, be considered harmless. (Code Crim. Pro., § 542, see also CPL 470.05, subd. 1.)

Order filed.

Appendix H – Final Opinion of New York Court of Appeals Affirming Convictions After Remand

STATE OF NEW YORK
COURT OF APPEALS

The People &c.,

Respondent,

vs.

Nathan Wheatman,

Appellant.

The People &c.,

Respondent,

vs.

Nathan Wheatman,

Defendant,

and

Jerry Jerome, & ors.,

Appellants.

In 1966, a New York County Grand Jury indicted the appellants – four individuals and three corporations – for conspiracy and bribery stemming from a bid-rigging arrangement to prevent competitive bidding on publicly advertised contracts for painting at city housing projects. Involved were

painting contractors (the appellants Jerome, Spector and Marcus and their companies, the defendants Campbell, Goldman, Fishbein and Barron as well as Esrig, Graham and Metzger, accomplices not indicted): employees of the New York City Housing Authority (the appellant Wheatman and the defendants Lowell and Nolan); and an official of a painting union (the defendant Rarback). Following a ten-week trial in the New York County Supreme Court, the appellants were convicted of the crimes of conspiracy (under § 580 of the former Penal Law), of conspiracy to prevent competitive bidding on public contracts (under § 581-a) and of bribery (under § 378).[1]

Upon appeal, the Appellate Division reversed the conviction of the appellants Jerome, Spector and Marcus (and their companies) and ordered a new trial; it was the court's conclusion that the seizure of certain documents, received in evidence upon the trial, was illegal because of the insufficiency of the affidavit on which search warrants were issued (33 AD 2d 67). The court affirmed appellant Wheatman's conviction, concluding that he lacked standing to challenge the validity of the warrants or to question the admissibility of the evidence (34 AD 2d 3 [on reargument]).

On the People's appeal to our court, we decided that the affidavit on which the search warrants had been issued was sufficient; accordingly, we reversed the Appellate Division's order and remitted the case to that court for consideration of the appellants' points on the merits (29 NY 2d 337). On Wheatman's appeal, we withheld determination, believing it desirable to pass upon the merits of his case along with those of the other appellants if, on remand, the Appellate Division affirmed their convictions. It did affirm (38 AD 2d 801), expressly stating that the arguments made by the six defendants

1. Of the other defendants, we note that Campbell pleaded guilty before trial; that, as to Fishbein, Barron, Nolan and Rarback, the jury failed to reach a verdict; and Goldman and Lowell were not tried, the court having directed a severance.

before it were "without merit." We heard the appeals of the seven appellants during our April session.

The appellants seek a reversal of their convictions on a number of grounds, several of which we discuss below.

I.. Evidence of Guilt

The People's case is based on the testimony of several accomplices and is firmly corroborated by copies of documents, prepared and used by the New York City Housing Authority, which were found in the offices of each of the appellant painting contractors. Since the testimony of the accomplices is somewhat repetitive, we limit ourselves to that of Esrig, for it was he who, in 1957, played a large part in initiating and developing the conspiracy. He, as well as other contractors, considered the prices paid by the Housing Authority too low to allow for substantial profits. Believing that, if they were to combine and control the bidding, their lot would be far better, he suggested to a number of his fellow craftsmen that they should get together and agree, before placing their bids for any particular job, who was to put in the successful bid. To "police" the undertaking, he proposed that they employ the leader of the painting union, Rarback, pointing out that he could "harass" any member of the combine who "broke the line" and cause trouble to nongroup members who bid and obtained a contract from the Authority. Rarback agreed to do the job for 2% of the contract price. More particularly, he undertook to keep those not parties to the conspiracy "out of the bidding" and, if any such contractor "did bid and was a low bidder, he would harass" him by insisting on strict compliance with union rules and regulations and by assigning to his projects shop stewards who would see to it that "the men did as little as

possible."

Esrig also spoke to Wheatman, the head of the Authority's paint section and his colleague, a man named Lowell. Wheatman and Lowell, it was arranged, were to receive 1% of the contract price in return for providing the conspirators with the Authority's confidential information, on the basis of which it prepared its own bid estimates. They also agreed to expedite payments to members of the group and to see to it that the Authority inspectors assigned to jobs being performed by such members would be "friendly disposed" to them.

The inside information, which Wheatman prepared, provided a "complete breakdown" of the number of apartments to be painted, the number of "man-days" required to paint them and the "per diem cost" of the project. Upon receiving this information, Jerome – who was one of the leaders of the group between 1960 and 1965 – had the task of revising the estimate figures slightly downward, of retyping such revised figures on Authority "breakdown" or estimate sheets and of then distributing them to other members of the group as guidelines in placing their bids. With such information in their hands, the contractors were in a position to tailor their bids to the Authority's specifications.

Little is to be gained by further detailing the evidence given by the accomplices. As indicated, they described the operations of the conspiracy, the manner in which the bids were arranged and worked out, the bribes paid regularly to Wheatman, Lowell and Rarback, the constant harassment by inspectors – of both the Authority and of the union – when outsiders obtained jobs or when a group member fell behind in his bribe payments or bid independently and was awarded the contract.

Their testimony is quite convincing, and no basis exists for the appellants' charge that they were "unreliable." In any event, their veracity and credibility were for the jury to assess and, despite the sharp and lengthy cross-examination to which the witnesses were subjected, it is enough to say that the jury believed them.

Contrary to the appellants' contention, there was, as already mentioned, ample corroboration of the accomplices' testimony to satisfy the requirements of section 399 of the Code of Criminal Procedure (now CPL 60.22). The independent evidence, we have declared, is sufficient "if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth." (*People v. Dixon*, 231 N.Y. 111, 116; see, also, e.g., *People v. Leo*, 23 N Y 2d 556, 560-561; *People v. Morehouse*, 21 N Y 2d 66, 74.)

As we have already noted, Esrig testified that Wheatman had provided the conspirators with inside information consisting of bid estimates and specifications for the contracts. Corroboration for the testimony against Wheatman is found in his admission to one of the Authority's security officers, Donald Schatz. He testified that Wheatman told him that he had prepared five copies of bid estimates, instead of the three required for Authority use, and that he had given the two extra copies to Esrig and Campbell, two of the contractors in the conspiracy.[2] Wheatman also told Schatz that he had lied to the grand jurors.

Indisputably corroborating the accomplices' testimony,

2. Wheatman's secretary and another Authority employee, Cooke, confirmed that for years Wheatman had made two extra copies of the bid estimates.

not only against Wheatman but against the appellant contractors as well, was the evidence that the police had found copies of the bid estimates and handwritten lists containing the Authority's estimate figures in the office of each of the appellant contractors. More specifically, the copies of the documents found in the appellant contractors' offices contained *revised* estimate figures, written in pencil, which were designed to make certain that the bids filed did not too closely duplicate the estimates prepared by the Authority. Moreover, the papers which Esrig received from Jerome confirmed and corroborated the former's testimony that it was the appellant Jerome who had retyped the documents and revised the estimate figures: the peculiar sort of script on the sheet indicated that it was from a typewriter in Jerome's office.

In short, comparison of the documents, introduced in evidence and submitted to the jury for inspection, demonstrates that Jerome obtained carbon copies of the bid estimates which Wheatman had prepared, that he passed the information he received, along with his revised estimates, on to the other appellants who relied upon such information in filing their bids.

II. *Court's Charge as to Feldman's Status*

Graham, one of the accomplices not indicted, had become a member of the conspiracy in 1960. Sidney Feldman, who was Graham's brother-in-law, joined his firm in June of 1961. He testified that, "just being broken into the painting business," he drove Graham, and the latter's partner Barron, to several meetings attended by other group members. Prior to going to one of these meetings, he heard Graham "object" to Baron's insistence that their firm had to join "the group"; Graham said, according to Feldman, that "[h]e was doing business [and] did

not need this group." Feldman also testified that he once saw Graham pay money to the defendant Nolan, the Authority's inspector who had told Graham not to bid on jobs without the group's approval and that, on two occasions, at Graham's direction, he himself paid money to Nolan. Concerning the latter payments, Feldman indicated that he made them solely because his employer directed him to do so; "I was told to do it," he asserted, "and that was it."

The trial judge instructed the jury that Esrig, Graham and Metzger were accomplices as a matter of law but refused to give a similar instruction with respect to Feldman. Instead, he left Feldman's status to the jurors as a question of fact, telling them that, if they found that he "knowingly participated in the conspiracy * * * and intended to further [its] objectives," then, Feldman was to be treated as an accomplice but that, if they found that he was "a mere messenger or conduit" for his employer, then, they could conclude that he was not an accomplice.[3]

The instructions given by the court were correct. A witness may be stamped as an accomplice only if there is "a showing that [he] took part in the preparation or perpetration of the crime with the intent to assist therein [cases cited], or that the witness counseled, induced or encouraged the crime [case cited]" (*People v. White*, 26 N Y 2d 276, 278), for, as we held more than 40 years ago, "The generally accepted test as to whether a witness is an accomplice is whether he himself could have been convicted * * * either as principal or accessory * * * The question of intent must always enter as an element of the

3. The charge on this subject, insofar as relevant, reads as follows:
"* * * if you find from the evidence that Feldman knowingly participated in the alleged conspiracy to rig bids and bribe public officials and intended to further the

crime." (*People v. Jackerson*, 247 N.Y. 36, 43; see, also, *People v. Clougher*, 246 N.Y. 106, 110-111; *People v. Crossman*, 241 N.Y. 138, 145-146; *People v. Swersky*, 216 N.Y. 471, 475-477; *People v. Sweeney*, 213 N.Y. 37, 44, 47; Ann., Accomplices – Question of Law or Fact?, 19 ALR 2d 1352, 1374.) This court's holding in the *Sweeney* case (213 N.Y. 37, *supra*), in which the defendants were tried for the crime of conspiracy, is particularly pertinent. There, the wife of one of the accomplices (Thomas Walsh) paid money to another accomplice (Fox). In upholding the trial judge's refusal to charge that Mrs. Walsh was an accomplice as a matter of law, the court wrote (p. 47):

> "It does not appear, at least as a question of law, that Mrs. Walsh had guilty knowledge of the alleged conspiracy. She had some knowledge of the relations between her husband and Fox. She knew that Fox, as a member of the police force, had collected graft for her husband as a captain in said force, but she testified that her procurement of $150 and the delivery thereof to one hartigan, to which she also testified, were at her husband's direction and from his money, and she repeatedly testified that she had no knowledge of what was ultimately to be done with the money. It does not clearly appear that she had knowledge that it was to be used for an unlawful purpose. The evidence was far from being sufficient to connect her as a principal in the crime charged in the indictment."

objectives of the conspiracy, you may come to the conclusion as a factual matter, that Feldman is an accomplice.

"Should you come to that conclusion as a matter of fact, then Feldman's testimony is accomplice testimony, and it may not be used to corroborate any other witness, but his testimony must be corroborated in accordance with the rules of law which I explained to you.

"However, if you come to the conclusion that Feldman was a mere messenger or conduit for his employer, in such instance you may come to the conclusion that he was not an accomplice as a matter of fact. Should you reach that determination, then his testimony may be used as corroboration, if believed by you, as independent evidence which may tend to connect a defendant or defendants with the crime charged."

Since, in the case before us, the facts adduced upon the trial left Feldman's intent in doubt and his status as accomplice inconclusive, the trial judge very properly left the issue to the jury.[4]

III. *Other Contentions*

The appellants also urge that they were prejudiced (1) by evidence that some of the witnesses had been assaulted or threatened and (2) by the prosecuror's action, in calling a witness – one Picarello – who, before taking the stand, announced in the jury's presence that he would not testify.

Based on the evidence, the jury was warranted in finding that the conspiracy charged against the appellants involved acts or harassment and intimidation of outsiders who had the temerity to bid on Housing Authority proposals. In other words, there was ample basis for concluding that the assaults testified to were arranged and inflicted in furtherance of the conspiracy. Accordingly, evidence of such conduct was clearly admissible against all the conspirators. (See, e.g., *People v. Fiore*, 12 N Y 2d 188, 200; *People v. Lucianos*, 277 N.Y. 348, 358; *People v. Connolly*, 253 N.Y. 330, 340.)

4. Feldman expressly testified that he paid the bribe money to Nolan only because he was told to do so by Graham. Moreover, it appears that Feldman had overheard Graham assert that he "objected" to joining the group and that "he did not need this group." This being so, the jury might well have found that Feldman believed, if he gave any thought to the matter, that the payments which Graham directed him to make were not for the purpose of advancing or promoting the bid rigging but were, on the contrary, the price which Nolan exacted for not taking retributive action against Graham as an outsider who had succeeded in obtaining contracts independently of the group. In that event, quite obviously, the payments would not have been in furtherance of the conspiracy charged in the indictment.

Picarello had previously testified before a Kings County Grand Jury that he and another had assaulted Graham — indeed, had pleaded guilty to such an assault — and the New York County District Attorney expected and hoped that he would give similar testimony to the trial jury in this case. However, when he was called as a witness, he refused to take the stand and, in the presence of the jury, stated: "I know nothing about the case. I don't want to take the stand. I have nothing to say." He was then excused. The trial judge immediately instructed the jury that "[t]he situation that just occurred * * * is evidence of nothing * * * You are to disregard [it] completely." The appellants could not possibly have been harmed by this incident. The jurors had no idea of the testimony which the prosecutor expected from the witness or any knowledge of Picarello's connection with the case. All they knew was what he said, namely, that he knew nothing about the case. There was not the slightest intimation that his refusal to testify was based on his privilege against self-incrimination, nor was there any basis for the fear that the jurors might have inferred from his conduct that any testimony he was going to give would have inculpated the defendants on trial. *People v. Pollack* (21 N Y 2d 209, 212), upon which the appellants rely, presented an entirely different situation.

Likewise without substance is the appellants' argument that the Supreme Court's decision in *Bruton v. United States* (391 U.S. 123) rendered inadmissible Wheatman's statement to Schatz, the Authority's security officer, that he had prepared two extra copies of the agency's estimates and had lied to the grand jury when he testified that he had prepared only three. The court in *Bruton* decided that a defendant's confession or admission may not be received in evidence if it implicates his codefendants. (See *People v. Jackson*, 22 N Y 2d 444, 450.)

However, and this the appellants overlook, the rule laid down in *Bruton* does not apply to a case in which the challenged statement, such as the one before us, does not incriminate any of the declarant's codefendants. (See, e.g., *People v. Wallace*, 13 Cal App 3d 608, 613; *State v. Gibson*, 3 Wn. App. 596, 601.)

We have considered the other contentions advanced by the appellants and find them so lacking in merit as not to require discussion.

In each case, the order appealed from should be affirmed.

* * * * *

In each case:

Order affirmed. Opinion by Fuld, Ch. J. All Concur.

APPENDIX I – Order for Which Review is Sought

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 2nd day of December in the year of our Lord one thousand nine hundred and seventy-one, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, *Presiding.*
RAYMOND J. CANNON, *Clerk.*

REMITTITUR December 2, 1971.

(Same Title)

BE IT REMEMBERED, That on the 25th day of June in the year of our Lord one thousand nine hundred and seventy, The People &c., the appellant in this cause, came here unto the Court of Appeals, by Frank S. Hogan, District Attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Jerry Jerome and Jered Contracting Corp. &ors., the respondents in said cause, afterwards appeared in said Court of Appeals by Irving Anolik and Rudolph Ebenfeld, & ors., their attorneys.

Which said Notice of Appeal and the return thereto, filed

as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Lewis R. Friedman, of counsel for the appellant –, and by Mr. Irving Anolik, of counsel for the respondents Jerome and Jered, and by Mr. Frederick H. Block, of counsel for the respondents Marcus, and by Mr. Allen H. Weiss, of counsel for the respondents Spector and Dunrite, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and the case remitted to the Appellate Division for further proceedings in accordance with the opinion herein.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, the First Judicial Department, there to be proceeded upon according to law.

Therefore, it is considered that the said order be reversed &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, First Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

/s/Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,

Albany, December 2, 1971

I Hereby Certify, that the proceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ Raymond J. Cannon
Clerk

[Seal]

APPENDIX J – Final Order in Proceedings

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 8th day of June in the year of our Lord one thousand nine hundred and seventy-two, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur June 8, 1972

1. 178. 72

The People &c.,

Respondent

vs.

Nathan Wheatman,

Defendant

and

Jerry Jerome,
&ors.

Appellants

BE IT REMEMBERED That on the 13th day of April in the year of our Lord one thousand nine hundred and seventy-two Jerry Jerome, & ors., the appellants in this cause, came here unto the Court of Appeals, by Irving Anolik, & ors., their attorneys, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The People etc. the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals, having heard this cause argued by Mr. Irving Anolik, of counsel for the appellants Jerome and Jered, submitted by remaining appellants, and argued by Mr. Lewis R. Friedman of counsel for the respondent and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York there to be proceeded upon according to law.

THEREFORE, it is ordered that the said order be affirmed as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

s/ Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, June 8, 1972.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

s/ Raymond J. Cannon
Clerk.

(Seal)